SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 187

FRANK G. RATH, INDIVIDUALLY AND AS PRESIDENT OF HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, COOKS' LOCAL UNION NO. 167, ET AL.,

Petitioners,

vs.

PEARL E. CROSBY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

The Opinion of the Court Below.

The opinion of the Supreme Court of Ohio is reported in 136 Ohio State 352.

B.

Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is Title 28 U. S. C. A., Section 344(b), (Judicial Code, Section 237(b), as amended by the Act of February 13, 1925).

The Federal Question.

The opinion of the Ohio Supreme Court shows clearly that the court passed upon the claim that an injunction restraining peaceful picketing violates the rights of free speech guaranteed by the Federal Constitution. As noted above, the majority opinion adopted the following language from the case of *Meadowmoor Dairies, Inc.*, v. *Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N. E. (2d) 308:

> "The right to contract, the right to do business, and the right to labor freely and without restraint, are all constitutional rights, equally sacred, *and the privilege of free speech cannot be used to the exclusion of other constitutional rights, nor as an excuse for unlawful activities in interference with another's business* * * *." (Emphasis supplied.)

Judge Day dissented squarely on the issue of the constitutional right of free speech. His opinion states:

> "Peaceful picketing, by carrying placards, signs, distribution of literature, or by oral speech, is not, in and of itself, unlawful. It is a lawful right emanating from and protected by the constitutional provision governing the exercise of free speech."

The dissenting opinion of Judge Zinnmerman also discloses the fact that the Court considered and passed upon the constitutional question of free speech. He said:

> "* * * The opinion has also been advanced that an injunction denying the members of a labor union the right to apprise the public of the true facts in relation to an employer of labor by means of 'peaceful picketing', reasonably exercised on a peaceable basis, would constitute an infringement of the constitutional guarantee of free speech."

On this state of the record, the Federal question was properly presented and raised.

Petitioners contend that since the record *conclusively* shows that the Supreme Court of Ohio *considered* and *decided* the Federal question, i. e., the rights of the petitioners to free speech under the United States Constitution and the amendments thereto, it *necessarily* follows that this Court has jurisdiction to entertain the petition for certiorari.

The rule of law formulated by the decisions of this Court applicable to the situation in the case at bar is:

If the highest court of the State in which decision could be had expressly passes upon the Federal claim, it is immaterial to inquire how or when the Federal claim was raised.

The following cases sustain this Court's jurisdiction:

Manhattan Life Insurance Co. v. *Cohen,* 243 U. S. 123 at 134 (1914);

Cumberland Coal Co. v. *Board of Revision,* 284 U. S. 23 at 24 (1931);

Home Insurance Co. v. *Dick,* 281 U. S. 397 at 407 (1930);

Hill v. *Smith,* 260 U. S. 592 at 594 (1923);

People ex rel. Bryant v. *Zimmerman,* 278 U. S. 63 at 68 (1928);

Chicago, R. I. & P. R. R. v. *Perry,* 259 U. S. 548 at 551 (1922);

Cissna v. *Tennessee,* 246 U. S. 289 at 294 (1918);

Mallinckrodt v. *State of Mississippi,* 238 U. S. 41 at 49 (1915);

Grannis v. *Ordean,* 234 U. S. 385 at 392 (1914);

State ex rel. Anderson v. *Brand,* 303 U. S. 95 at 98 (1938).

C.

Statement of the Case.

A summary statement of the case appears under the heading "A" in the Petition for Writ of Certiorari and, in the interest of brevity, is incorporated here by reference. A more extended statement appears in the argument that follows.

D.

Specification of Errors.

1. The Supreme Court of Ohio erred in failing to hold that the rights of the petitioners to free speech, under the XIVth Amendment to the United States Constitution, permitted them to give information to the public regarding their union grievances against the employer, by carrying banners and placards on the public highways.

2. The Supreme Court of Ohio erred in failing to hold that the rights of the petitioners to free speech, under the XIVth Amendment to the Constitution of the United States, prevented State authorities from destroying their constitutional rights by characterizing them as unlawful activities.

3. The Supreme Court of Ohio erred in sustaining that portion of the trial court's decree which reads as follows:

> "1. * * * from picketing, bannering or patroling the streets or sidewalks adjacent to or in the vicinity of the plaintiff's place of business.
>
> "3. From inducing or attempting to induce any customer, prospective customer or any person, firm or corporation with whom plaintiff deals, not to deal with plaintiff; and from making, publishing, distributing, or displaying any statement, oral, written, printed, painted or otherwise, or from any other act or thing

with the intent, purpose or effect of injuring the plaintiff's business and from threatening to do so."

E.

ARGUMENT.

I.

Freedom of Speech Guaranteed by the Constitution.

The denial of the right to tell the truth is in direct violation of the rights protected by the XIVth Amendment.

This Court has on several occasions said that this fundamental constitutional guarantee cannot be abridged if asserted peacefully for the protection of those fostering lawful enterprises. In the very recent case of *Thornhill* v. *Alabama*, 84 L. Ed. (Adv.) 659, this Court said, Syllabus I:

> "Freedom of speech and of the press, which are secured by the First Amendment against abridgement by the United States, are among the fundamental personal rights and liberties secured to all persons by the XIVth Amendment against abridgement by a state."

In the *dictum* on page 666 of the above case, Mr. Justice Murphy made this very significant statement:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147, 155, 162-63. *See Senn* v. *Tile Layers Union*, 301 U. S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as

yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U. S. at 478):

" 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' "

In *Carlson* v. *California,* 84 L. Ed. (Adv.) 668, it was decided:

"The constitutional right of free speech secured against state invasion by the XIVth Amendment is abridged by a county ordinance against it, without qualification, unlawful to carry or display any banner in the vicinity of any works, factory, place of business or employment for the purpose of influencing or attempting to influence any person to refrain from entering therein * * * or from performing any service or labor therein."

On page 667 of the above case, this Court said:

"The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern."

In *C. I. O.* v. *Hague,* 59 S. Ct. 985, it was stated:

> "It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due-process clause of the XIVth Amendment."

See also:

Schneider v. *State,* 308 U. S. 147;
Senn v. *Tile Layers,* 301 U. S. 468;
Herndon v. *Lowry,* 301 U. S. 242;
DeJonge v. *Oregon,* 299 U. S. 353;
Schenk v. *United States,* 249 U. S. 47.

II.

A Legitimate Trade Dispute Exists Between the Employer and Labor Unions.

The Supreme Court of Ohio in its majority opinion held that

> "The controlling question in the case is whether the evidence discloses the existence of a legitimate trade dispute;" (*Crosby* v. *Rath,* 136 Ohio State at 354);

and concluded that there was no such dispute.

Plainly, this conclusion cannot defeat petitioners' constitutionally protected right of free speech. A State court cannot foreclose this Court from independently inquiring into the facts and making its own conclusions, when necessary for the protection of Federal rights.

As stated in *Norris* v. *Alabama,* 294 U. S. 587, at 590:

> "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied

> in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

See also *Great Northern Railway* v. *Washington*, 300 U. S. 154, 165.

This Court has on numerous occasions developed the concept of a "legitimate trade dispute." The undisputed facts in the instant case clearly come within the concept so developed. The employer herein does not hire union labor (R. 287). She pays her employees lower wages than the prevailing union scale in the community for the same or similar services (R. 316-317). It logically follows, therefore, that the wages she pays, and the conditions under which her employees work, have an effect on the entire industry by which the members of the labor unions earn their livelihood in the pursuit of their employment. *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 186.

The fact that petitioners do not stand in a proximate employee relationship to the respondent employer is of no relevance whatever. It is a fundamental right of the petitioners to extend unionization throughout the industry, to induce all employers to employ members of petitioners' union. As strikingly stated by this Court in the recent case of *Apex Hosiery Co.* v. *William Leader and American Federation of Full-Fashioned Hosiery Workers, Philadelphia, Branch No. 1, Local No. 706* (Decided May 27, 1940):

> "Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v.

Tri-City Central Trades Council, 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization."

The action of the employer in failing to hire union labor has an effect on the entire restaurant industry in the City of Cleveland. This principle was stated by this Court in *Thornhill* v. *Alabama,* 84 L. Ed. (Adv.) 659, on pages 666 and 667:

> "* * * the practices in a single factory may have economic repercussions upon a whole region and effect widespread systems of marketing."

On page 66 of this case, this Court laid down the principle that:

> "It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned."

In *Exchange Bakery Company* v. *Rifkin,* 245 N. Y. 260, on page 263:

> "It (labor union) may be interested in the wages of those not its members or in the conditions under which they work as in its own members because of the influence of the one upon the other. All engaged in a trade are affected by the prevailing rate of wages; all by the principle of collective bargaining. Economic organization today is not based upon a single shop."

In the locality where the petitioners commenced picketing on October 4, 1937, the prevailing rule of law controlling therein was in *S. A. Clarke Lunch Company* v. *Waiters' Local,* 22 Ohio Appellate 265, Syllabus 3:

> "Where restaurant refused labor union's proposal that it employ union labor, it cannot enjoin, as unlawful

> boycott, peaceful distribution of cards by labor union asking public not to patronize unfair place."

(This opinion has not been reversed, distinguished or modified by the Supreme Court of Ohio.)

We submit that there exists a genuine dispute between the employer, who, within her legal rights, rejected the proposals of the petitioners. She employed persons of her own choosing. The employer's action in rejecting the petitioners' proposal brought into existence the petitioners' right to influence the patronage of persons affiliated with and sympathetic to the organized labor movement.

III.

Employer's Claims Cannot Defeat Petitioners' Right of Free Speech.

The employer has claimed and will claim that the right of free speech ought to be wholly denied to the petitioners for the reason that it was shown at the hearing that acts of violence occurred.

The reading of the record and the finding by each court that heard this case does not disclose that *any member of the labor union,* whether party defendant or not in the hearing of the case, either directly or indirectly authorized, participated in or ratified any act of violence that was claimed to have been committed. The Supreme Court of Ohio in its majority opinion did not find that the petitioners were in any manner guilty of the violence. On this score we cite to the Court, Judge Zimmerman's dissenting opinion, *Crosby* v. *Rath,* 136 Ohio State 352, at 358 and 359:

> "Acts of violence perpetrated against Mrs. Crosby, her employees and customers are mentioned in the majority opinion. It is to be borne in mind that these occurred prior to the issuance of the injunction by the

> Court of Common Pleas, that the defendants disclaim responsibility therefor, and that there is a lack of evidence implicating them."

The issuance of a decree against labor unions, enjoining peaceful picketing because violence occurred, though unproven, violates the lawful purpose of the organized labor union, and is an unwarranted penalty. In Frankfurter and Greene, "The Labor Injunction", on page 33, it is stated:

> "Unwittingly a court may be pronouncing judgment upon the implications of a label instead of weighing the elements of an industrial conflict as it actually transpired."

But even assuming *arguendo* that there had been some prior acts of violence in this case, there is still no legal justification for denying petitioners' right peacefully to picket. The decisions clearly indicate this.

In the case of *Iron Molders Union* v. *Allis Chalmers Company*, 166 Fed. 45 (C. C. A. 7, 1908), the Circuit Court of Appeals for the Seventh Circuit separated lawful acts from the unlawful acts, stating as follows:

> "And consequently the parts of the decree which prohibit the use of persuasion and picketing can be justified only on the basis that such means are not to be lawfully applied in a genuine struggle of labor to obtain better terms and conditions; for surely men are not to be denied the right to pursue a legitimate end in a legitimate way simply because they may have overstepped the mark and trespassed on the rights of their adversary. A barrier at the line, with punishment and damages for having crossed, is all that the adversary is entitled to ask." (166 Fed. at 49.)

Accordingly, the Court held that prohibition of persuasion and picketing as such should not be included in the decree.

In the case of *Fenske Brothers* v. *Upholsterers' Union*, 358 Ill. 239, 193 N. E. 112 (1934), the Illinois Supreme Court had previously held that:

> "The mere fact that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceable persuasion. There was therefore no basis for restraining the displaying of placards, and it was error to have done it." (358 Illinois at page 260; 193 N. E. at 121.)

To the same effect and substance, see *People* v. *Young*, 188 Ill. App. 208, at 212, 213 (1914); *Henrici Company* v. *Alexander*, 198 Ill. App. 568.

The same rule is adopted in separating lawful from unlawful acts occurring on a picket line in the case of *Wise Shoe Company* v. *Lowenthal*, 266 N. Y. 264, 194 N. E. 749 at 750 (1935), where the New York Court of Appeals enjoined acts of violence but refused to enjoin peaceable picketing, i. e., peaceable persuasion.

In the case of *Warner* v. *Lilly Co.*, 265 U. S. 526 (1924) at page 532, this Court held that in an unfair competition case the defendant should not be enjoined from doing lawful acts in the future (such as using chocolate in his quinine preparation) simply because prior to that time the defendant has committed unlawful acts, i. e., attempting to infringe upon plaintiff's product.

In the case of *Borderland Coal Company* v. *Gasway*, 278 Fed. 56 (1921), the Circuit Court of Appeals for the Seventh Circuit held that, simply because the Union had committed certain unlawful acts such as violence and the like, it would not be restrained from doing lawful acts in the future, such as attempting to unionize the coal districts in which the plaintiff corporations are located.

In addition, the individual petitioners cannot be deprived of their constitutional rights to free speech as the result of "unlawful acts of violence" by irresponsible and author-

ized third persons. This Court has recently had occasion to point out that there is every reasonable presumption against the loss of fundamental constitutional rights by waiver. *Johnson* v. *Zerbst*, 304 U. S. 458 at 464 (1938).

See also,

Cinderella Theatre v. *Sign Writers' Union*, 6 Fed. Supp. 164;

Kentucky Diamond Coal Co. v. *Mine Workers*, 188 Ky. 477;

Boiler & Engine Co. v. *Benner*, 14 Ohio Decisions 357.

Surely, where, as here, the record fails to disclose any responsibility on the part of unions for the prior acts of violence, such unions should not be punished therefor by being denied a constitutional right upon which the whole labor movement depends for its very existence.

The employer claims and will claim that she has certain contracts of employment with her several employees and that she would, therefore, be prohibited from entering into any contract with the labor unions. It is significant to note that she has been in business for a period of more than nine years and that at no time was any employee under contract (R. 78-123). Picketing under limitation of judicial order commenced October 11, 1937 (temporary consent decree filed in Court of Common Pleas of Cuyahoga County, Ohio, on said date.) No employee was under contract. However, more than one and one-half months of such picketing continued before the employer entered into these purported "agreements" (R. 417). These written instruments are nothing more than a recitation of the minimum wage regulations of the State of Ohio, with a three month tenure of employment. Under these so-called "agreements" the employees gain nothing. 41 Harvard Law Review, 754:

> "The interest of labor to better itself in respect to conditions, hours and wages, and by some courts even

> the strengthening of the labor union itself for the accomplishment of these ends, are embraced within the privileges of inducing breach of contract."

We insist, therefore, that these "contracts" cannot be employed by Mrs. Crosby to defeat the lawful purpose of the petitioners.

The employer claims and will claim that it is immaterial to her whether or not any of her employees belong to the labor unions. We maintain that, in the interest of fair dealing, it is unreasonable for her to employ language of indifference and then proceed to thwart the lawful activities of the petitioners.

> "While Mrs. Crosby declares she is not antagonistic toward union labor and has no objection to her employees becoming union members, the record contains instances tending to belie such statements. Particular reference is made to the reaction initially displayed to the suggestion of unionization and the tactics subsequently adopted; to the treatment of a union waitress working for a time at the Crosby restaurant, and to the development when a union organizer attempted to approach the restaurant cooks, who had evinced a friendliness to his overtures." (Dissenting opinion by Judge Zimmerman, *Crosby* v. *Rath,* 136 Ohio State 363.)

We maintain, that regardless of what rights she may claim her rights are not superior to the right of free speech under which the petitioners claim protection, and if in conflict with petitioners' right her rights may not be exercised so as to effect a total destruction of petitioners' right of free speech and assemblage.

F.

Summary and Conclusion.

We have undertaken to show that the Supreme Court of Ohio, in denying to the labor unions the right to picket

peacefully, failed to grant to the labor unions the inalienable right to tell the truth. The truth is that the employer does not hire union labor. It is our contention that we have the right so to notify the public.

Your petitioners submit, therefore, that the relief prayed should be granted and that the decision of the Supreme Court of Ohio be reversed.

Respectfully submitted,

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